87-874

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO.

TIMOTHY C. SHASHATY,

Petitioner

- vs -

STATE OF CONNECTICUT,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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APPENDIX A

NO. 13061

STATE OF CONNECTICUT SUPREME COURT

V. STATE OF CONNECTICUT

TIMOTHY SHASHATY SEPTEMBER 23, 1987

O R D E R

THE MOTION OF THE DEFENDANT FILED AUGUST 27, 1987 FOR REARGUMENT AND RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,

Carolyn Cunha Zeogos/s/
Asst. Clerk-Appellate

APPENDIX B

DECISION OF SUPREME COURT OF CONNECTICUT

STATE OF CONNECTICUT V. TIMOTHY SHASHATY

205 Conn. 39 (August 18, 1987)

PETERS, C.J., HEALEY, SHEA, CALLAHAN and COVELLO, Js.

SHEA, J. The Appellate Court upheld the judgment of the trial court rendered in accordance with a jury verdict finding the defendant guilty of the crimes of sexual assault in the first degree, in violation of General Statutes § 53a-70(a), and unlawful restraint in the first degree, in violation of General Statutes § 53a-95(a). State v. Shashaty, 8 Conn. App. 387, 513 A.2d 172 (1986). The Appellate Court ruled that the trial court had committed harmless error in (1) giving the jury an unwarranted

"missing witness" instruction, and (2) permitting the state to introduce evidence of the defendant's silence prior to his arrest but after receiving Miranda warnings. Having certified this appeal, we affirm the judgment of the Appellate Court.

Although the facts that the jury could reasonably have found are set forth in State v. Shashaty, supra, we summarize those pertinent to the issues in this appeal. On March 6, 1983, the victim, an eighteen year old high school girl, attended a party at a friend's home in Milford. The defendant, Timothy C. Shashaty, who had never met the victim before, also attended the party. At about 9 p.m. the defendant borrowed a car and drove the victim to a store to purchase cigarettes, at which time the two engaged

in "just small talk." Later in the evening, at about 11 p.m., after the victim had fought with another guest over the disappearance of the victim's purse, the defendant spoke with the victim, who had locked herself in the bathroom, for about ten minutes. When the victim went back downstairs, the two spoke again for about thirty minutes, during which time the defendant "tried to kiss [her] a few times." After resisting the defendant's advances, the victim, sometime between 12:30 and 1 a.m., left the party and began to walk home.

The defendant followed the victim and caught up with her on Gulf Street. When the victim rebuffed the defendant's demand that she walk with him, the defendant lifted her onto his shoulders and started

walking down the street. In response to the victim's screams, the defendant stated, "If I put you down, you have to let me hold your hand and walk with you." The victim acceded to the defendant's demand, and the two walked hand-in-hand for a while. When the victim eventually indicated that, in order to go home, she had to turn left, the defendant picked her up once again and, ignoring her screams, carried her toward the right. The defendant took the victim across New Haven Avenue to the yard of a house, dropped her to the ground, partially removed her pants, and forced her to have sexual relations with him.

Four days later, on March 10, 1983, two Milford police officers drove to the defendant's home and "informed him that his name had come up in an investigation." One

of the officers, William Graham, asked the defendant whether he would agree to meet at the police station later in the day to discuss the matter. The defendant agreed and went to the station that afternoon. At the subsequent interview, Graham initially told the defendant that "he was not under arrest and he could leave any time. He was free to go." The defendant then gave an oral statement accounting for his time on the night of the assault. Prior to signing the typewritten transcript of that account, the defendant was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 467-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and then signed a standard waiver form.

In his written statement of March 10, 1983, the defendant denied any involvement in the sexual assault. He stated that he

had left the party at about 1 a.m. with his girlfriend, and two other guests. The defendant stated that the four had departed in a car, and that he had been taken directly home and had gone straight to bed.

The defendant was arrested on March 23, 1983, after being formally charged in a two count information with the crimes of sexual assault in the first degree and unlawful restraint in the first degree. At the trial, the three persons with whom the defendant, in his March 10, 1983 statement, said that he had been driven home, testified that he had remained at the party after they had departed. The party hostess testified similarly. The defendant, testifying in his own behalf, stated that he had hitchhiked home after leaving the party and that someone named Mark had picked him up

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and driven him home. The defendant was convicted of the crimes charged and sentenced to a total term of six years. From the Appellate Court judgment affirming the judgment of the trial court, the defendant has brought the present appeal.

I

The defendant first claims that the Appellate court erred in ruling that the unwarranted "missing witness" instruction given by the trial court constituted harmless error. The trial court charged the jury as follows: "It is the law of the State that the failure of a party to call a witness or witnesses who are within its power to produce entitles you, the jury, to infer that the testimony of such witness or witnesses would be unfavorable to that party.

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"In this case, the defendant testified that, after leaving the party ... he hitch-hiked and received a ride from a person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

The missing witness instruction is commonly known as the "Secondino charge," by virtue of this court's holding in Secondino v. New Haven Gas Co., 147 Conn. 672, 165 A.2d 598 (1960). The Secondino court reiterated the rule that "'[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause.'" Id., 675; Ezzo v.

Geremiah, 107 Conn. 670, 677, 142 A. 461 (1928). "There are two requirements for the operation of the rule: The witness must be available, and he must be a witness whom the party would naturally produce." Secondino v. New Haven Gas Co., supra; see State v. Roma, 199 Conn. 110, 120, 505 A.2d 717 (1986); State v. Hart, 198 Conn. 424, 428, 503 A.2d 588 (1986).

The State concedes that the Secondino charge given by the trial court in the present case was both unwarranted and incorrect as a matter of law. First, the state offered no evidence in support of the instruction to show that the missing witness, Mark, was available. See State v. Boyd, 178 Conn. 600, 605, 424 A.2d 279 (1979); State v. Long, 171 Conn. 18, 21, 368 A.2d 199 (1976). Second, the instruc-

tion as delivered did not adequately apprise the jury of both prongs of the Secondino rule. See Secondino v. New Haven Gas Co., supra, 676-77. To require a reversal, however, error must be harmful. Id. 677.

The Appellate Court reasoned that, "[b]ecause the defendant's claim of error involves only an evidentiary matter, and not the violation of a constitutional right, the burden of proving the harmfulness of the charge rests upon the defendant." State v. Shashaty, supra, 391-92. In this appeal the defendant suggests that the Secondino charge, "even if otherwise proper under local rules of evidence," implicates constitutional rights because "it violates the presumption of innocence and shifts the burden of proof from the prosecution to the defendant." This court,

however, has held to the contrary. See State v. Annunziato, 169 Conn. 517, 538, 363 A.2d 1011 (1975), cert. denied, 441 U.S. 966, 99 S.Ct. 2417, 60 L.Ed.2d 1072 (1979); see also State v. Peary, 176 Conn. 170, 182, 405 A.2d 626 (1978). We have recognized, moreover, that the evidentiary basis for the Secondino inference derives from the maxim that "'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.'" Ezzo v. Geremiah, supra, quoting Blatch v. Archer, 1 Cowper 63, 65 (1774)(Lord Mansfield); see also Throckmorton v. Chapman, 65 Conn. 441, 454, 32 A. 930 (1895). Accordingly, we agree with the Appellate Court that, because the erroneous instruction engenders a claim

arising under state law and does not involve any constitutional right, the defendant bears the burden of proving harmful error. See State v. Silva, 201 Conn. 244, 250, 513 A.2d 1202 (1986); State v. Conroy, 194 Conn. 623, 627, 484 A.2d 448 (1984).

In order to meet his burden of proving that the unwarranted Secondino charge constituted harmful error, the defendant must show that the charge was likely to have affected the verdict. State v. Brown, 187 Conn. 602, 611, 447 A.2d 734 (1982); State v. McClain, 171 Conn. 293, 300, 370 A.2d 928 (1976). This he had not done. The state's case against the defendant was a strong one. See generally State v. Gonzalez, 197 Conn. 677, 682-83, 500 A.2d 1330 (1985). The victim positively identi-

fied the defendant as her attacker. Further, the condition of the clothing worn by the victim the evening of March 6, 1983, which the state introduced into evidence, tended to corroborate the victim's version of the facts. Her sweater and slacks were stained with soil and grass, and traces of sperm were found on her underwear. Additionally, the credibility of the defendant had already been significantly damaged when he admitted, while being cross-examined, that his statements to the police on March 10, 1983, had been lies. In the light of this admission, any further harm to the defendant's credibility resulting from the Secondino instruction must reasonably be seen to have been minimal.

Finally, it is significant to note that the victim's factual account accusing the

defendant of sexual assault and the defendant's alibi story at trial were not necessarily mutually exclusive. In other words, even if the jurors believed the defendant's claim that he had hitchhiked home after the party and had received a ride from someone named Mark, they might have also believed that the defendant had assaulted the victim prior to being picked up. The defendant's failure to show any inconsistency between his alibi and the victim's complaint further supports our conclusion that the defendant has not carried his burden of proving that the court's error was harmful under the standard application to a nonconstitutional error. We therefore hold that, under the circumstances of this case, the Appellate Court correctly determined that the erroneous Secondino charge given

by the trial court was harmless.

II

The principal issue in this appeal is whether the state may introduce evidence of a defendant's silence after he has received Miranda warnings but prior to his arrest. In its rebuttal presentation, the state questioned Graham, the police officer who had taken the defendant's statement on March 10, 1983, about the defendant's failure to correct that statement between March 10 and March 23, the date of his arrest.[1] The defendant challenges the ruling of the Appellate Court that the error of the trial court in permitting such questioning by the state was harmless

1 The following portion of the transcript records, in relevant part, the rebuttal examination of Officer William Graham:

beyond a reasonable doubt. The state, on the other hand, urges us to affirm the judgment of the Appellate Court upon the alternative ground that, because the defendant was not in custody when he gave his March 10, 1983 statement, any evidence of the defendant's silence prior to his arrest was properly admitted.

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1 (continued) "Q. And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?

"A. No.

"Q. At any time during that period [of] time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from [the] party on March 6?

"A. No."

Our analysis of the circumstances of this case differs from that of the Appellate Court. The Appellate Court assumed that the questioning by the police of the defendant on March 10, 1983, constituted "custodial interrogation." See State v. Shashaty, supra, 393. The court then held that the admission into evidence of the defendant's subsequent silence was erroneous under the rule of Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976), that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." See State v. Shashaty, supra. Relying upon Chapman v. United States, 547 F.2d 1240 (5th Cir.), cert. denied, 431 U.S. 908, 97 S.Ct. 1705,

52 L.Ed.2d 393 (1977), however, the Appellate Court concluded that the Doyle error in the present case was harmless beyond a reasonable doubt. State v. Shashaty, supra, 394-95. The Chapman court had stated that, "[w]hen there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." Chapman v. United States, supra, 1250.

We disagree with the Appellate Court that the defendant was in police custody on March 10, 1983, when he gave his alibi statement that later proved to be false.

As we have detailed, Graham and an accompanying Milford police officer went to the defendant's home and asked the defendant whether he would agree to stop by the police station to discuss the alleged sexual assault. The defendant was not in the company of the police when he arrived at the station later that day. At that time Graham told the defendant that "he was not under arrest and he could leave any time." Further, the defendant left the police station freely, approximately one hour after the interview had begun. It is clear that, under such circumstances, the March 10, 1983 interview of the defendant was not a "custodial interrogation." See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); Hunter v. State, 590 P.2d 888, 895 (Alaska 1979); 1

W. LaFave & J. Israel, Criminal Procedure (1984) § 6.6.

Because the defendant was not under arrest or otherwise in custody when he went to the police station on March 10, 1983, the giving of Miranda warnings was not essential before the police interrogated him. "[P]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, supra; see Miranda v. Arizona, supra, 467-69; State v. Vitale,

197 Conn. 396, 411, 497 A.2d 956 (1985).

The issue before us, however, is not whether Miranda warnings were required, but whether, once the police had given them, the defendant may have relied upon their assurance of his right to remain silent so that the rebuttal testimony concerning his failure, after receiving the warnings, to correct the statement he had made to the police violated his right to due process. Neither this court nor any federal court has yet had occasion to consider the issue before us, whether the use of a defendant's pre-arrest, but post-Miranda, silence violates his due process rights under the United States constitution.[2] As we have

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2 The defendant nominally makes his due process claim under both the state and federal constitutions. "The due process clauses of the United States constitution,

noted, Doyle v. Ohio, proscribes the use for impeachment purposes of a defendant's silence subsequent to his arrest and after receiving Miranda warnings. "The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach

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2 (continued) § 1, of the fourteenth amendment, and of the Connecticut constitution, article first, § 8, can be treated together because they 'generally have the same meaning and impose similar constitutional limitations.' Keogh v. Bridgeport, 187 Conn. 53, 60, 444 A.2d 225 (1982); McKinney v. Coventry, 176 Conn. 613, 616, 410 A.2d 453 (1979)." Gunther v. Dubno, 195 Conn. 284, 297 n. 13, 487 A.2d 1080 (1985). The defendant proffers no argument for enhanced state constitutional protection and, on the facts of this case, we see no reason independently to perform such an analysis. See State v. Thompson, 197 Conn. 67, 76 n. 6, 495 A.2d 1054 (1985).

his trial testimony." (Emphasis added.) Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 639, 88 L.Ed.2d 623 (1986); see also State v. Zeko, 177 Conn. 545, 553-54, 418 A.2d 917 (1979).

Doyle has not been extended to apply to a defendant's silence before he has been taken into custody and given Miranda warnings; Jenkins v. Anderson, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 2486 (1980); or to his silence following his arrest but before receiving such warnings. Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). Doyle has also been held inapplicable to cross-examination of a defendant concerning his failure to inform the police, at the time of his statement following his arrest and receipt of Miranda warnings, of the

inconsistent version of the crime given in his trial testimony. Anderson v. Charles, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 1173 (1980); see State v. Casey, 201 Conn. 174, 184-86, 513 A.2d 1183 (1986); State v. Talton, 197 Conn. 280, 295, 497 A.2d 35 (1985).

Two state courts have dealt with the issue facing us today, but have reached different conclusions. The Supreme Judicial Court of Maine held that the use of pre-arrest silence following Miranda warnings could be used to impeach a defendant, who had made no statement to the police, concerning "his failure to tell the officers the story he told on the stand." State v. Robinson, 496 A.2d 1067, 1072 (Me. 1985). The Wisconsin Supreme Court, however, decided that "[r]eceipt of the

Miranda warning is the important factor in the Doyle analysis, not whether the defendant had been arrested," and that, "[t]herefore the Doyle rationale protects post-Miranda silence whether occurring before or after arrest."[3] State v. Fencl, 109 Wis.2d 224, 234, 325 N.W.2d 703 (1982).

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3 The Wisconsin Supreme Court also went on to conclude that the use of pre-arrest silence for impeachment, even in the absence of Miranda warnings, constituted a violation of the defendant's fifth amendment privilege against self-incrimination. State v. Fencl, 109 Wis.2d 224, 233 n. 6, 235-38, 325 N.W.2d 703 (1982). We have held to the contrary based upon the statement in Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 2486 (1980), as follows: "We conclude that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility." State v. Leecan, 198 Conn. 517, 504 A.2d 480, cert. denied, ___ U.S. ___, 106 S.Ct. 2922, 91 L.Ed.2d 558 (1986).

In this case there is no necessity for us to venture into this unsettled area of federal constitutional law and we reject the state's invitation to do so. Even if the admission of the rebuttal testimony concerning the defendant's failure to return to the police in order to correct the statement he previously had given constituted a constitutional error, as the Appellate Court concluded, we agree with the further analysis made by that court holding that its admission was harmless beyond a reasonable doubt. See State v. Shashaty, supra, 394-95. As the Appellate Court noted, "the state's attorney merely asked the officer as a factual matter whether 'at any time, [he] receive[d] any contact from [the defendant] and information from him that he had either been

mistaken or lied in this statement.' After the officer answered no, the state's attorney then asked whether the officer had been 'advised of the existence of any individual by the name of Mark, who allegedly picked [the defendant] up while he was hitchhiking home from [the party] on March 6?" When the officer stated that he had not, the line of questioning was dropped." Id.

The defendant does not claim any further reference at trial to his silence.[4]

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4 The state conceded at oral argument that it had offered its rebuttal evidence of the defendant's pre-arrest silence both to impeach the defendant's credibility and, substantively, to demonstrate his consciousness of guilt. In its instructions to the jury, however, the court made no reference to the applicability of such evidence to show the defendant's consciousness of guilt. Further, because the transcript does not record the closing arguments of counsel, we cannot ascertain

The credibility of his alibi defense advanced at trial already had been "substantially damaged," as the Appellate Court observed, by the testimony of his first alibi contained in his statement to the police, that he had been in the company of those witnesses at the time the crime occurred. Coupled with the devastating effect of the defendant's prior admittedly contrived alibi upon the credibility of his testimony at trial, the evidence of the crime presented by the state must fairly be characterized as overwhelming. The defend-

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4 (continued) whether the state argued for such a substantive use of the defendant's silence. The use of the defendant's pre-arrest silence on rebuttal rather than on cross-examination of the defendant did not deprive him of an opportunity to offer an explanation for his silence. He could have offered further testimony, his own or that of others, to explain or refute the state's rebuttal testimony.

ant was not a stranger to the victim, as they admittedly had been in each other's presence for several hours at the relatively small party that had preceded the crime. No serious issue of her ability to identify him has been raised. As we have mentioned in discussing the erroneous Secondino charge, the victim's testimony concerning the circumstances of the assault was corroborated by the examination of her clothing following her report of the incident to the police. We agree with the Appellate Court that the criteria for finding a Doyle error harmless beyond a reasonable doubt as set forth in Chapman v. United States, supra, 1249-50, were adequately satisfied in this case.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

APPENDIX C

DECISION OF THE APPELLATE COURT

STATE OF CONNECTICUT V. TIMOTHY SHASHATY

8 Conn. App. 387 (August 5, 1986)

HULL, SPALLONE and BIELUCH, Js.

Hull, J. The defendant was convicted after a jury trial of sexual assault in the first degree and unlawful restraint in the first degree, in violation of General Statutes §§ 53a-70(a) and 53a-95(a), respectively. The defendant appeals from his judgment of conviction claiming that the trial court made two errors: (1) in giving the jury a "missing witness" instruction adverse to the defendant when there was no showing that the witness was available; and (2) in permitting the prosecution to present evidence that the defendant exercised his right to remain

silent after having been given Miranda warnings. We find no harmful error.

The jury reasonably could have found the following facts. On March 6, 1983, the victim[1] walked to a party at the Milford home of Emily Lewis. She arrived at the

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1 General Statutes § 54-86d provides: "Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense."

General Statutes § 54-86e provides: "The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b, or 53a-73a, or injury or risk of injury, or impairing

party at 6 p.m. The defendant arrived at the party at 7:30 p.m., accompanied by a friend. Later in the evening, at about 11 p.m., a confrontation arose between the victim and another guest over the disappearance of the victim's purse. The victim was upset after the fight and locked herself in the bathroom. The defendant entered the bathroom and talked to the victim for some time. Eventually, the party broke up and the victim started to walk home by herself.

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1 (continued) of morals under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused."

In order to uphold the spirit of these statutes, we will not disclose the name or address of the victim. She will be referred to herein as "the victim."

The victim testified that at the party, the defendant tried to kiss her. She resisted and told the defendant that she had to go home. The defendant caught up with her on her walk home and she rebuffed his demand that she walk with him. The defendant then picked her up, put her over his shoulder and began walking down the street with her. He put her down after she agreed to walk with him and hold his hand. The defendant soon put her over his shoulder again, and despite her screams, carried her through the yards of several residences before putting her down and forcing her to have sexual intercourse with him. After a few minutes, the defendant fled and the victim walked home by herself.

Lieutenant William Graham of the Milford police department testified that

the victim came to the police on March 9, 1983, and reported the incident. While awaiting the results of various laboratory tests, Milford police officers, on March 10, 1983, asked the defendant to stop by the police station to answer some questions. The defendant agreed, and was subsequently interviewed by police officers regarding the victim's sexual assault complaint. The defendant asserted his innocence after having been given full Miranda warnings. Miranda v. Arizona, 483 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He made a written statement that he had left the party with his girlfriend Melissa Junget, and two people named Billy McClafferty and Maryann Kopec. In the written statement, which was accompanied by a signed waiver of the defendant's con-

stitutional rights, the defendant asserted that the four left in Kopec's car and that the defendant was driven to his house where he went to bed. Lewis, Kopec, McClafferty and Junget all testified, however, that the defendant remained at the Lewis house after Junget, Kopec and McClafferty had departed.

The defendant testified at trial that he did attend the Lewis party and had expected to get a ride home with Lewis' boyfriend. When the boyfriend decided to spend the night at the Lewis house, the defendant had to hitchhike home. He stated that he was picked up by someone named "Mark" and driven to his house. This person was never called as a witness and in its charge to the jury, the court gave a "missing witness" instruction respecting the defendant's failure to call him.

The defendant's first claim on appeal concerns the "missing witness" instruction given to the jury.[2] The court charged the jury as follows: "the failure of a party to call a witness ... who ... [is] within its power to produce entitles you, the jury, to infer that the testimony of such witness ... would be unfavorable to that party. In this case, the defendant testified that, after leaving the party at Emily Lewis's home, he hitchhiked and received a ride from a person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

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2 Whether the charge was requested or given sua sponte is in dispute.

Secondino v. New Haven, 147 Conn. 672, 165 A.2d 598 (1960), is the seminal case in Connecticut on the "missing witness" doctrine. In Secondino, the court stated that "'[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause.' ... There are two requirements for the operation of the rule: [t]he witness must be available, and he must be a witness whom the party would naturally produce." Id., 675. A Secondino charge may not be given, however, unless the party claiming the benefit of the adverse inference proves that the missing witness is in fact available to the other party. State v. Shindell, 195 Conn.

128, 138-39, 486 A.2d 637 (1985); State v. Boyd, 178 Conn. 600, 605, 424 A.2d 279 (1979).

The state offered no evidence as to the availability of "Mark" and it concedes that the Secondino charge delivered by the trial court was both unwarranted and incorrect as a matter of law. The state claims, however that the defendant has not established, as he must, the harmfulness of the trial court's error.

When a defendant's claim of error on appeal is not of a constitutional nature, the burden rests upon the defendant to demonstrate that the claimed erroneous action of the trial court would have been likely to affect the result. State v. Gonzalez, 197 Conn. 677, 681, 500 A.2d 1330 (1985); State v. Cooper, 182 Conn. 207,

212, 438 A.2d 418 (1980); State v. Ruth, 181 Conn. 187, 197, 435 A.2d 3 (1980). Because the defendant's claim of error involves only an evidentiary matter, and not the violation of a constitutional rights, the burden of proving the harmfulness of the charge rests upon the defendant. See State v. Gonzalez, supra, 681.

The defendant offers only one statement to support his claim of harm. He claims in his brief that "permitting such an inference to be drawn against a defendant in a criminal case under any circumstances violates the presumption of innocence and denies due process of law." This statement is insufficient to support the defendant's burden of proving harmfulness.

As the only evidence of the defendant's alibi was his own testimony, it is obvious

that his credibility was very important. That credibility had been severely damaged already, however, when he admitted that he lied about his whereabouts to the police in his written statement. In light of that repudiated statement and the testimony of the victim herself, any prejudice to the defendant by the erroneous Secondino charg is minimal. When faced with a similar situation, our Supreme Court in State v. Gonzalez, supra, held that comments made b the prosecution with respect to the failur to call a witness constituted harmless error. We likewise conclude that the erro was harmless.

The defendant's second claim is that the trial court erred in permitting the state to question a police officer to show that between the time of his first state-

ment and his arrest, the defendant did not contact the police to correct that statement. According to the defendant, introduction of this evidence violated his right to remain silent as interpreted by the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). We agree.

It has long been clear that when an accused is in custody, "our law affords him the right to reply to [a] question or statement, or to remain silent." State v. Ferrone, 97 Conn. 258, 266, 116 A. 336 (1922). In Doyle v. Ohio, supra, 619, the United States Supreme Court determined that this right is violated by "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after [he] receiv[es] Miranda warnings..." The

state does not contest this general rule but argues that where, as here, a defendant makes a statement, his silence, after custodial interrogation has ended, may then be used for impeachment. In support of this argument, the state relies on the rule that if the defendant chooses not to remain silent any statement he makes "after Miranda warnings have been given, relating to the facts of the crime with which [he] is charged, may be used to impeach his credibility by illustrating inconsistencies between that statement and a different exculpatory statement given during his in-court testimony. State v. Reid, 193 Conn. 646, 480 A.2d 463 (1984)." State v. Apostle, 8 Conn. App. 216, 222, ___ A.2d ___ (1986).

This court has recently rejected the

state's claim that post-statement silence may be used for impeachment purposes. State v. Apostle, supra. In Apostle, a case that is factually very similar to the present case, we held that the state may not question a defendant or comment about his failure to correct, after a police interrogation has ended, a false statement made during that interrogation.[3] That decision was based, in part, on the fact that "[a] defendant may reassert his right to remain silent at any time, and if he ceases to answer questions, or to come for-

3 In State v. Apostle, 8 Conn. App. 216, 227-28, ___ A.2d ___ (1986), in contrast to this case, the state questioned the defendant, not the police officer, about his failure to change his statement. We view this difference to be of no significance. It is error to admit evidence of a defendant's failure to change a statement after in custody interrogation has ended regardless of how that evidence is offered.

ward with additional or correcting informa
tion after questions are no longer being
asked of him, there is a reasonable possi-
bility that he is relying upon that right.
Id., 224. Accordingly, we conclude that
the trial court should not have allowed th
state to question the police officer abou
the defendant's failure to correct his
statement.

Having determined that the trial cour
erred, we must next determine whether
reversal of the defendant's conviction mus
follow. "Under certain circumstances, th
state's use of a defendant's post-arrest
silence does not constitute reversible
error. In limited instances, '"[w]hen
there is but a single reference at trial
the fact of defendant's silence, the refe
ence is neither repeated nor linked with

defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.), cert. denied, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977)....'" State v. Apostle, supra, 227, quoting State v. Zeko, 177 Conn. 545, 555, 418 A.2d 917 (1979). We conclude that applying these standards, this case presents one of those "few instances"; State v. Apostle, supra; where the error was harmless.

Here, in contrast to Apostle, the state did not comment on the defendant's failure to change his statement. Rather, the state's attorney merely asked the officer

as a factual matter whether "at any time, [he] receive[d] any contact from [the defendant] and information from him that he had either been mistaken or lied in his statement." After the officer answered no, the state's attorney then asked whether the officer had been "advised of the existence of any individual by the name of Mark, who allegedly picked [the defendant] up while he was hitchhiking home from Emily Lewis's party on March 6?" When the officer stated that he had not, the line of questioning was dropped. This testimony was not commented on or emphasized in closing argument. Additionally, the defendant's alibi defense had already been substantially damaged by introduction of the statement he gave to the police which was contradicted by four witnesses in addition to the

victim. In the light of these factors, we conclude that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible questioning.

There is no error.

In this opinion the other judges concurred.